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Supreme Court, U.S.
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In The

Supreme Court of the United States

ANGELA PERRY
AND MICHAEL GREEN,

Petitioners,

v.

MAV MIRFASIHI, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED,
AND FLEET MORTGAGE CORP.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit correctly interpreted the Fair Credit Reporting Act ("FCRA" or the "Act"), 15 U.S.C. § 1681 *et seq.*, by holding that (1) a mortgage lender selling more than one million consumer reports was not a consumer reporting agency, and (2) the exemption for information based solely on the reporting entity's own experience with its customers also exempts customer information based on sources other than the reporter's own experience, even though these holdings would narrow the Act's scope in violation of clear congressional intent as found by this Court and contradict what every other circuit to consider the question has held.

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties.

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INTRODUCTION

This is an appeal from the approval of an abusive national class settlement paying $750,000 in attorneys' fees but nothing ($0) to 1.4 million class members for releasing their FCRA claims with statutory damages of between one hundred million and one billion dollars ($100,000,000 -- $1,000,000,000). Without discussing whether it might eliminate its subject matter jurisdiction over the case, the Seventh Circuit (Posner, J.) concluded that the FCRA class claims were "frivolous" on the grounds that (1) Fleet Mortgage Corp. ("Fleet Mortgage" or "FMC") was not a consumer reporting agency under FCRA even though it had sold more than one million consumer reports to third-party telemarketing firms, and (2) Fleet Mortgage was entitled to the exemption for information based solely on its own experience with its customers even though it furnished information based on sources other than its own experience. In an attempt to insulate its decision from review by this Court, the Seventh Circuit breached its fiduciary-like duty to protect absent class members by also concluding that the otherwise meritorious FCRA claim was waived and/or beyond the scope of remand even though the district court had interpreted the remanding decision to include the FCRA claim but made an error of law in concluding that it had no value.

Petitioners (formerly, Objectors) Angela Perry and Michael E. Green respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit approving that settlement. The terms of the

class settlement approved by the Seventh Circuit are so unfair to class members as to demonstrate inadequacy of representation under *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 621 (1997), and, if allowed to stand, would set a new standard for allowable *de minimis* settlements harming class members in all future class actions. In addition, this Court has held that FCRA should be interpreted broadly because of "the ambitious objective set out in the Act's statement of purpose," *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, ---, 127 S.Ct. 2201, 2211 (2007), but the Seventh Circuit's holding will have the practical effect of significantly narrowing the Act. In light of the division among the courts of appeals and the Seventh Circuit's failure to follow both *Amchem* and *Safeco,* the petition should be granted.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 2007 WL 2066503 (N.D. Ill. July 17, 2007), and reproduced in the appendix at App. 12. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 551 F.3d 682 (7th Cir. 2008), and reproduced in the appendix at App. 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 30, 2008, the same day its opinion issued. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Fair Credit Reporting Act ("FCRA" or the "Act") uses broad, functional definitions to impose civil liability on anyone who, acting as a credit reporting agency, issues credit reports in violation of the Act. FCRA defines a credit reporting agency as anyone who "regularly engages in . . . the practice of assembling or evaluating consumer credit or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 USC §1681a(f). FCRA defines a 'consumer report' as "any information . . . serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes." 15 U.S.C. § 1681a(d)(1).[1] A FCRA violation occurs when a consumer reporting agency furnishes a consumer report under circumstances other than those expressly set forth in 15 U.S.C. § 1681b. Where the FCRA violation is willful/reckless, the aggrieved party need not show actual damages but instead is entitled to statutory damages ranging between $100 and $1,000. 15 U.S.C. § 1681n(a)(1)(A). FCRA exempts from liability "any report containing information solely as to transactions or experiences between the consumer and the person making the report." 15 U.S.C. § 1681a(d)(2)(A)(i).

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[1] *See also* 16 CFR Part 600 Appendix Commentary on § 603(d) at ¶4.D ("A list of names of creditworthy individuals . . . is a series of 'consumer reports' because the information bears on credit worthiness.") (Also found at LEXSTAT 16 CFR 600.1, page 3).

STATEMENT OF THE CASE

I. The Claims Underpinning This Case.

Pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), this case was brought in federal district court for alleged violations of the Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, and other state laws stemming from Fleet Mortgage Corp.'s ("Fleet Mortgage") practice of selling to telemarketing firms nonpublic, personal and financial data about its customers, including mortgage account numbers, current loan balances and phone numbers without their knowledge or consent. Fleet Mortgage also provided telemarketing firms with specific information about the consumer's mortgage account, such as original loan amounts, current loan balances, monthly payments, loan origination dates and loan maturity dates. Most importantly for the purposes of the FCRA claim, Fleet Mortgage reported to the telemarketing firms that each of its customers had qualified for and received a mortgage based at least in part on information provided by the customer, *e.g.*, mortgage applications and credit reports, that was not based solely on Fleet Mortgage's relationship with the customer. Telemarketing firms used the information contained in this prescreened list to sell Fleet Mortgage customers insurance, memberships in various clubs that claim to offer discounts on services such as car maintenance, lawyers' fees and, ironically, privacy protection.

II. The Proposed and Rejected First and Second Class Settlements

This case has had a tortured procedural history as Plaintiff Mirfasihi and Fleet Mortgage (the "settling parties") have three times attempted to settle the case on a class-wide basis seeking the broadest imaginable release from and offering no recovery to 1.4 million members of the class, while the Petitioners-Objectors have challenged each of those *de minimis* settlements.

On July 31, 2002, the settling parties filed a joint motion to preliminarily approve a class action settlement ("First Settlement"). On August 2, 2002, the District Court preliminarily approved the First Settlement. On October 30, 2002, Petitioners-Objectors Michael Green and Angela Perry moved to intervene to object to the First Settlement. On November 27, 2002, Fleet Mortgage filed an opposition to Green's and Perry's request to be heard. On December 3, 2002, the District Court rejected Perry's objection as untimely. On December 4, 2002, the District Court denied Green's motion to intervene, granted final approval of the First Settlement, and granted the settling parties' request that the court impose a $3.15 million bond requirement on anyone who sought to appeal the court's approval order. On January 8, 2003, Green and Perry appealed the approval of the First Settlement and challenged the bond requirement. On January 29, 2004, the Seventh Circuit reversed the order approving the First Settlement and remanded the case.

On May 31, 2005, the Plaintiff and Fleet Mortgage moved for final approval of a revised settlement (the "Second Settlement"). The District Court never entered an order preliminarily approving the Second Settlement, nor did the District Court conduct a fairness hearing on the settlement. Also, none of the Class members were given notice of the Second Settlement. On June 28, 2005, Green and Perry filed objections to the Second Settlement, and they moved to be appointed as interim counsel for the Class members under Fed. R. Civ. P. 23(g). On August 11, 2005, the District Court approved the settlement, overruled Green's and Perry's objections and denied their Fed. R. Civ. P. 23(g) motion. On September 8, 2005, Green and Perry appealed the approval of the Second Settlement. On June 19, 2006, the Seventh Circuit reversed the order approving the Second Settlement and remanded the case.

III. The Approved But Inadequate Third Proposed Class Settlement

In a Memorandum Decision issued July 17, 2007 (the "Approval Order"), the District Court approved the Second Settlement after the settling parties had proposed it for a second time (the "Third Settlement"), with some additional rationalizations for its low value, over the Petitioners-Objectors' objections. Shortly thereafter in a separate opinion dated September 6, 2007, the District Court awarded the Objectors attorneys' fees in the amount of $18,750 (the "Fee Order"). The Objectors appealed both the Approval Order and the Fee Order.

On December 30, 2008, the Seventh Circuit approved the Third Proposed Class Settlement despite its low value to the class based in part on valuing the Class FCRA claim at $0 on the grounds that (1) Fleet Mortgage was not a consumer reporting agency under FCRA even though Fleet Mortgage had sold over one million consumer reports to third parties (*i.e.*, the telemarketing firms), (2) the information Fleet Mortgage reported to the telemarketing firms was exempt from FCRA liability even though it included information about Fleet Mortgage's customers obtained from sources other than its own experience, and (3) the FCRA claim had been waived and/or was beyond the scope of the remand. *See Mirfasihi v. Fleet Mortgage Corporation,* 551 F.3d 682 (7th Cir. 2008) (Posner, J.) (App. at 1 *et seq.*).

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Creates an Unnecessary and Confusing Division Among the Federal Courts of Appeals on Important Issues of Federal Law.

A. Every Court To Consider the Issue Has Disagreed with the Seventh Circuit on the Definition of Consumer Reporting Agency.

FCRA defines a credit reporting agency as anyone who "regularly engages in . . . the practice of assembling or evaluating consumer credit or other information on consumers for the purpose of furnishing consumer reports to third parties." 15

USC §1681a(f). Fleet Mortgage is a consumer reporting agency within the meaning of FCRA because it assembled or evaluated 1.4 – 1.6 million consumer reports based in part on the information regarding his/her creditworthiness that each of its customers had to demonstrate in order to obtain a mortgage from Fleet Mortgage and then furnished those reports to third-party telemarketing firms. Because the telemarketing firms intended to use these consumer reports to determine whether Fleet Mortgage's customers were eligible for certain types of personal insurance and/or credit transactions, the sale of their personal financial information falls under FCRA. *See* 15 U.S.C. §1681a(d)(1) ("'consumer report' means . . . any information . . . serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes").

While the Seventh Circuit apparently believed that Fleet Mortgage could not be a consumer reporting agency simply because it was a "bank," *Mirfasihi,* 551 F.3d at 686 (App. at 7), every other court to consider the issue has correctly interpreted the Act's definitions more broadly. *See, e.g., Hodge v. Texaco, Inc.,* 975 F.2d 1093, 1095-96 (5th Cir. 1992) ("Admittedly, the extension of FCRA to a drug-screening reports case seems far from the original purposes behind the Act. However, Congress has enacted this statutory language which covers a broad range of conduct by its very terms. We cannot depart from the plain language of this statute on the basis that Congress must not have meant what it said. Accordingly, we conclude that workplace drug test reports are not categorically excluded from coverage

under the FCRA."); *Owner-Operator Independent Driver Ass'n, Inc. v. Usis Commercial Services, Inc.*, 410 F.Supp.2d 1005, 1009 (D. Colo. 2005) ("Clearly, the employer motor carriers are consumer reporting agencies under this expansive definition. The cases on which defendant relies are inapposite. *See Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985) (retailer which issued single report on consumer not a crediting reporting agency under the FCRA); *Rice v. Montgomery Ward & Co.*, 450 F.Supp. 688, 670 (M.D.N.C. 1978) (defendant which obtained credit reports on plaintiff for use in litigation not a consumer reporting agency under the FCRA). Unlike the defendants in *Rush* and *Rice,* who were sought to be held liable for isolated instances of issuing or obtaining a consumer report, the motor carriers who supply defendant with the Termination Report forms do so regularly and for a fee."). In fact, the case the Seventh Circuit relied upon in concluding that Fleet Mortgage was not a consumer reporting agency is clearly distinguishable from the facts of our case. *See Mirfasihi,* 551 F.3d at 686 (App. at 7) (citing *Frederick v. Marquette National Bank,* 911 F.2d 1, 2 (7th Cir. 1990), even though it held only that a lender was not a credit reporting agency when it engaged in single transaction with a single consumer).[2]

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[2] *See also Friend v. Ancillia Systems, Inc.*, 68 F.Supp.2d 969, 974 (N.D. Ill. 1999) (holding that law firm was not a consumer reporting agency where it was not "regularly engaging in the practice of assembling credit information"); *Oldroyd v. Assocs. Consumer Discount Co.*, 863 F.Supp. 237, 241 (E.D. Pa. 1994) (lender was not a credit reporting agency when it only reported information about loan payments between a single consumer and itself).

B. Every Court To Consider the Issue Has Disagreed with the Seventh Circuit on the Scope of the §1681a(d)(2)(A)(i) Exemption.

No circuit or district court to consider the scope of § 1681a(d)(2)(A)(i) has held, as the Seventh Circuit held in this case, that the exemption applies to an entity (such as Fleet Mortgage) transmitting credit information (that Fleet Mortgage had determined its customers were sufficiently credit worthy to receive a loan secured by a mortgage) to third parties (telemarketing firms). Fleet Mortgage had to rely on information existing prior to its relationship with its customers in deciding whether to make a loan and accept a mortgage from each in the first place. For example, mortgage lenders routinely rely upon personal financial information provided by the mortgagor-candidate as well as credit reports in determining whether to loan money in exchange for a mortgage. Therefore, when Fleet Mortgage sold a list of its mortgagors to third parties, as it did here, that list contained information in addition to what Fleet Mortgage had learned solely from its direct relationship with each mortgagor. When faced with this question, the other circuits have concluded that the § 1681a(d)(2)(A)(i) exemption does not apply where at least some of the transmitted information was acquired outside of the direct relationship with the reporter.

Nunnally v. Equifax Information Services, LLC., 451 F.3d 768, 773 (11th Cir. 2006) held "that the 'transactions or experiences' exception exempts any report "based solely on [the reporter's] own

experiences with one of its customers . . . not reports that include "information furnished by third parties to credit reporters" (citations omitted); *see also Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1095 (5th Cir. 1992) (stating that the exception applies to reports based on "first-hand experience ..., not on information gathered from outside sources"). Contrary to the Seventh Circuit, the Eleventh Circuit held that the § 1681a(d)(2)(A)(i) exemption does not apply to information that contains in part information provided by third parties:

> The letters from Equifax did not contain information solely about first-hand experiences of Equifax with the Nunnallys and Rhodes. The letters provided information reported to Equifax by third parties, such as JC Penney/Monogram, First USA Bank, CBS Collection Division, Homecomings Financial Network, and others. These letters are not excluded from the definition of a "consumer report."

Nunnally v. Equifax Information Services, LLC., 451 F.3d 768, 773 (11th Cir. 2006). Similarly, in holding that the sort of information at issue here is a consumer report unless shared among affiliates (which is not this case), the Ninth Circuit has concluded that the § 1681a(d)(2)(A)(i) exemption does not otherwise apply to such information. *See American Bankers Ass'n. v. Gould*, 412 F.3d 1081, 1087 (9th Cir. 2005).

Various district courts have reached the same conclusion. *See, e.g., Vrlaku v. Citibank*, 2005 WL 2338852 (D.N.J.,2005 Sept. 23, 2005) at *5 ("Citibank's allegedly wrongful communication arises solely from a transaction between it and the plaintiff and, therefore, is not a 'consumer report' under 15 U.S.C. § 1681a(d)(2)(A)(i))."); *Owner-Operator Independent Driver Ass'n, Inc. v. Usis Commercial Services, Inc.*, 410 F.Supp.2d 1005, 1009 (D. Colo. 2005) ("Defendant claims the Termination Report forms fall within this exception because they merely reflect transactions between the submitting motor carriers and their former employees. However, plaintiffs' complaint alleges, *inter alia,* that the Termination Report forms include not only information regarding the interactions between motor carriers and drivers, but also information about interactions between drivers and shippers. (*See* Complaint at 10, ¶ 19(a) & at 15, ¶ 20.) Accepting these allegations as true, which I must at this early junction, the forms may contain information beyond the first-hand experience of the employer. Dismissal therefore is not warranted on this basis."); *Martinets v. Corning Cable Systems, L.L.C.*, 237 F.Supp.2d 717, 720 (N.D. Tex. 2002) (holding that laboratory report is exempt consumer report so long as it contains only information based solely on transaction between testing lab and tested individual).

II. By Allowing Fleet Mortgage To Violate FCRA More Than One Million Times, the Seventh Circuit Ignored Clear Congressional Intent To Protect Consumers' Rights to Privacy and This Court's Precedent

Because "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, S.Ct. 1291, 146 L.Ed.2s 121 (2000) (internal citation and quotation marks omitted), any analysis of the FCRA claim raised here must be done in light of the congressional finding that "There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a **respect for the consumer's right to privacy.**" 15 U.S.C. §1681(a)(4) (emphasis added). When the relevant statutory language is read in light of the congressional intent that motivated its enactment, it is clear that Fleet Mortgage violated FCRA more than one million times.

First, Fleet Mortgage is a consumer reporting agency within the meaning of FCRA because it "regularly engage[d] in . . . the practice of assembling or evaluating consumer credit or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 USC §1681a(f). Here, Fleet Mortgage assembled or evaluated approximately 1.4 – 1.6 million reports containing credit or other information on its customers and sold that information to third-party telemarketing firms. The Seventh Circuit concluded that Fleet Mortgage

could not be a consumer reporting agency because it was a "bank," *Mirfasihi*, 551 F.3d at 686 (App. at 7), but that is incorrect because any entity can be a consumer reporting agency as long as it meets the Act's broad, functional definition. *See Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, ---, 127 S.Ct. 2201, 2211 (2007) (interpreting FCRA broadly based on "the ambitious objective set out in the Act's statement of purpose).

Second, the information Fleet Mortgage provided to third-party telemarketing firms that sold insurance are consumer reports under FCRA because they consisted of "any information . . . serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes." 15 U.S.C. § 1681a(d)(1). Although the telemarketing firms had used the information sold to them by Fleet Mortgage to sell insurance, among other products and services, the Seventh Circuit erred again by holding that the information Fleet Mortgage sold to telemarketing firms as exempt under Section 1681a(d)(2)(A)(i) (exempting from liability "any report containing information solely as to transactions or experiences between the consumer and the person making the report"). To the contrary, precisely because each Fleet Mortgage customer was a borrower-mortgagor, Fleet Mortgage reported information regarding each customer's creditworthiness based in part on information and/or transactions other than those involving Fleet Mortgage at the time the mortgage-backed loan was approved. *See Trans Union Corp. v. Federal Trade Commission*, 243 F.3d 809, 812 (D.C. Cir. 2001) ("consumer reports" include "lists of names

and addresses of individuals who meet specific criteria such as possession of . . . mortgages"), *rehearing denied by* 267 F.3d 1138 (D.C. Cir. 2001); 16 CFR Part 600 Appendix Commentary on § 604(3)(A) at ¶6 ("A prescreened list constitutes a series of consumer reports, because the list conveys the information that each consumer named meets certain criteria for creditworthiness.") (Also found at LEXSTAT 16 CFR 600.1, page 11); 16 CFR Part 600 Appendix Commentary on § 603(d) at ¶5.C ("A report that would not otherwise be a consumer report may be a consumer report, notwithstanding the purpose for which it is furnished, if it includes a prior consumer report or information from consumer report files, because it would contain some information 'collected in whole or in part' for consumer reporting purposes.") (Also found at LEXSTAT 16 CFR 600.1, page 4). Therefore, when Fleet Mortgage sold information on its customers to telemarketers, it was selling "consumer reports" within the meaning of FCRA because those reports contained credit information pre-existing that customer's relationship with Fleet Mortgage and been deemed sufficiently credit worthy to become a mortgagor. *See* 16 CFR Part 600 Appendix Commentary on § 603(d) at ¶4.D ("A list of names of creditworthy individuals . . . is a series of 'consumer reports' because the information bears on credit worthiness.") (Also found at LEXSTAT 16 CFR 600.1, page 3). A report containing solely public record information is still a "consumer report" within the meaning of FCRA so long as it meets the other criteria. 16 CFR Part 600 Appendix Commentary on § 603(d) at ¶4.E (Also found at LEXSTAT 16 CFR 600.1, page 3).

Third, Fleet Mortgage willfully violated FCRA by furnishing consumer reports under circumstances other than those expressly set forth in 15 U.S.C. § 1681b. Specifically, in "furnishing reports in connection with credit or insurance transactions that were not initiated by the consumer," 15 U.S.C. § 1681b(c), Fleet Mortgage violated the requirement that "information pertaining to a consumer ... not identify the relationship or experience of the consumer with respect to a particular creditor or other entity," 15 U.S.C. § 1681b(c)(2)(C), by identifying each consumer reported on as its own borrower-mortgagor. In addition, Fleet Mortgage has maintained throughout the course of trying to get its proposed settlement approved that it does not know the names or address of the Information-Sharing Class members. In doing so, Fleet Mortgage is admitting to another violation of the FCRA for failing to maintain its list of prescreened consumers. *See* 16 CFR Part 600 Appendix Commentary on § 609(d) at ¶11 ("A consumer reporting agency must furnish to a consumer requesting file disclosure the identity of recipients of any prescreened lists that contained the consumer's name when submitted to creditors (or other users) by the consumer reporting agency.") (Also found at LEXSTAT 16 CFR 600.1, page 22).

This Court recently concluded that liability under § 1681n(a) for "willfully fail[ing] to comply" with FCRA goes beyond "acts known to violate the Act" and includes "reckless disregard of statutory duty." *Burr*, 127 S.Ct. at 2208. The "reckless disregard" standard is met where the action

> is [1] not only a violation under a reasonable interpretation of the statute's terms, but [2] shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

Id. at 2215 (numbering added).

While it is impossible at this stage of the litigation to determine whether Fleet Mortgage knowingly or recklessly violated FCRA, the facts alleged here clearly meet the pleading requirements established by the Seventh Circuit:

> Killingsworth alleges that Household "preselected" and targeted her (among others) for its credit solicitation and accessed her credit information without her knowledge or permission for that purpose. She alleges that Household developed and approved the text and format of the solicitation, including numerous specific disclosures of credit terms and conditions that were neither clear nor conspicuous, and that it did all this willfully. This is enough factual detail to state a claim for a willful violation of the FCRA.

Killingsworth v. HSBC Bank, Nevada, N.A., 507 F.3d 614, 624 (7th Cir. 2007).

Similarly, even though the *Burr* court saw no

need for remand and further development of the factual record, *see Burr,* 127 S.Ct. at 2216, it is nevertheless the general rule that determinations of reasonableness and recklessness are typically done by a jury, *see, e.g., In re Farmers Ins. Co., Inc., FCRA Litigation,* 2008 WL 687085 at * 1-2 (W.D. Ok. 2008). Additional fact finding here is necessary because, unlike the case in *Burr* where neither defendant had anything to gain from conduct that violated the Act, Fleet Mortgage was trying to establish a business that could not be conducted without violating FCRA. Since Fleet Mortgage was selling consumer reports that had value precisely because they contained information identifying the consumers as its mortgagors, and intended to control the marketing and payment for the insurance and other products offered by the telemarketing firms through its pre-existing relationship with those mortgagors, it could not both comply with FCRA and pursue this business. Consequently, it had an economic incentive not present in *Burr* to violate the Act. Given Fleet Mortgage's self-interested economic incentive to violate FCRA and pursue this line of business, it cannot now be said as a matter of law that Fleet Mortgage "'diligently and in good faith attempted to fulfill its statutory obligations' and came to a 'tenable, albeit erroneous, interpretation of the statute.'" *Burr,* 127 S.Ct. at 2207 (quoting *Reynolds v. Hartford Financial Services Group, Inc.,* 435 F.3d 1081, 1099 (9th Cir. 2006)).

Fourth, where, as here, the FCRA violation is likely to be willful, the aggrieved party need not show actual damages but instead is entitled to statutory damages ranging between $100 and

$1,000, as well as punitive damages and attorneys' fees. *See* 15 U.S.C. § 1681n(a)(1)(A). Because Fleet Mortgage willfully violated FCRA with respect to each of the approximately 1.4 - 1.6 million consumer reports it furnished to telemarketing firms, this FCRA claim is potentially worth somewhere between $140 million (1.4 million customers times minimum statutory damages of $100 each) and $1.6 billion (1.6 million customers times maximum statutory damages of $1,000 each). As the Seventh Circuit held in a similar case, Fleet Mortgage's failure to comply with FCRA, combined with its scope of operations, make it potentially liable to the Information-Sharing Class members for in excess of one billion dollars. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("The reason that damages can be substantial, however, does not lie in an 'abuse' of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person, 15 USC § 1681n(1)(A), combined with [defendant's] decision to obtain the credit scores of more than a million persons."), *rehearing denied en banc,* Feb. 21, 2006.[3]

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[3] Congress amended the civil damage provision of FCRA after this case was filed, but that amendment does not apply here because it is not retroactive. *See Killingsworth,* 507 F.3d at 624 (concluding that "FACTA's elimination of private rights of action for § 1681m violations has an impermissibly retroactive effect when applied to claims that accrued before its December 1, 2004 effective date"), *rehearing and rehearing en banc denied* (Dec.13, 2007). The issues raised herein are still important beyond this case because the Federal Trade Commission retains the authority to prosecute FCRA violations. *See* 15 U.S.C. § 1681s.

III. Allowing This Abusive Class Settlement To Stand Would Violate *Amchem* by Unfairly Favoring Future Defendants in Class Settlement Negotiations.

A. *Amchem* Created a Balance between the Process of Balanced Settlement Negotiations and the Substance of Fair Settlement Offers That This Settlement Upsets

In rejecting the class settlement proposed in *Amchem*, this Court made the common sense observation that a class settlement is only as good as the negotiation process that produced it, focusing specifically on whether "class counsel ... could [] use the threat or litigation to press for a better offer ... and the court would face a bargain proffered for its approval without benefit of adversarial investigation." *Amchem Products, Inc.*, 521 U.S. at 621 (citations omitted). Part of that weaponry class counsel brings to the negotiation table is the ability to argue to defendant that a proposed class settlement must meet some minimum standard of fairness and adequacy in order to avoid objections and obtain court approval. *See, e.g., Amchem Products, Inc.* 521 U.S. at 619-20 (noting with approval that, when rejecting the proposed settlement, the Third Circuit "homed in on settlement terms in explaining why it found the absentees' interests inadequately represented").

When a settlement as defective as the one here has been approved by a court as influential as the Seventh Circuit and a jurist as preeminent as

Judge Posner, however, it becomes the new nationwide minimum standard for class settlements because any proposed settlement with terms similar to this one would arguably be worthy of approval as well. *See International Union, United Auto, Aerospace, and Agr. Implement Workers of America v. General Motors Corp.*, 497 F.3d 615, 628 (6th Cir. 2007) (reviewing terms of settlement to determine whether there was adequacy of representation). Based on the settlement approved here, class action defendants can now disarm class counsel (and, in turn, the court) on the grounds that class counsel can still be paid even if settling class members receive nothing, so long as class counsel is willing to surrender any arguably valuable claims as they did here. Consequently, absent class members with claims too small to litigate individually would lose their only realistic chance for a recovery on the merits. *See Amchem Products, Inc.*, 521 U.S. at 617 (1997).

B. The Seventh Circuit Approved an Abusive Class Settlement that is Defective in Many Material Respects.

1. The Information-Sharing Class Members Receive Nothing from the Settlement.

When Judge Posner evaluated the First Settlement, he identified a number defects charitably described as "questionable features." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). The most glaring among them was the fact

that the 1.4 million Information-Sharing Class members will receive nothing under the settlement – "a big fat zero." *Mirfasihi*, 356 F.3d at 785. In Judge Posner's own words, "[t]he settlement . . . sold these 1.4 million claimants down the river." *Mirfasihi*, 356 F.3d at 785. While the Seventh Circuit believed that a settlement paying 1.4 million Class members nothing for releasing their claims cannot be approved unless the claims are actually worthless, *Mirfasihi*, 356 F.3d at 785-86, the Third Settlement puts these class members in a worse position than if there was no settlement at all. It provides that the Class members must release any and all claims they might have against Fleet Mortgage and a host of other entities, some named and some unnamed, relating to Fleet Mortgage's information-sharing and telemarketing activities. The release also includes claims that were never raised in the suit, and thus which were never brought to the Class members' attention. Accordingly, in exchange for nothing, the Class members must abandon potentially successful claims that are being pursued on their behalf elsewhere, and claims that were never raised or evaluated. No economically rational person would knowingly accept this deal or pay $750,000 in attorneys' fees to the class counsel who negotiated it.

2. The Seventh Circuit Did Not Require Giving Notice of the Third Settlement to Class Members.

In an attempt to minimize the scrutiny that this abusive Third Settlement would receive, Fleet Mortgage and class counsel agreed that no notice of

the settlement would be given to Class Members and that Fleet Mortgage was entitled to terminate the settlement if it was determined that notice of the settlement would have to be given to the Information-Sharing Class members. Giving notice of the Third Settlement was necessary to disclose the following previously undisclosed material information:

1) the Second Settlement had been rejected by a federal appeals court;

2) the same attorneys who sold the Information-Sharing Class "down the river" were nevertheless allowed to negotiate the Second and Third Settlements on their behalf;

3) class counsel were conflicted from trying to improve the Information-Sharing Class's recovery on their original claims or bringing new claims for unfair settlement practices;

4) the Third Settlement purports to release new claims against additional parties that did not exist at the time notice was given;

5) the Information-Sharing Class was in a stronger bargaining position than it was initially because FMC is now judicially estopped from challenging class certification;

6) the Information-Sharing Class members who were residents of states such as Massachusetts (where there was a preexisting class action) would have a better chance of recovering something by opting out than by agreeing to the Third Settlement which gives them nothing; and

7) the Petitioners-Objectors were willing to continue to press the claims of Class members who were to receive nothing under the Third Settlement.

3. Class Counsel Receive $750,000 Even Though They Previously Sold the Class "Down the River" and Are Conflicted.

The Seventh Circuit initially held that the District Court had failed to ensure that "class counsel are behaving as honest fiduciaries for the class as a whole" because the First Settlement contained numerous material deficiencies, *e.g.*, "denial of relief to an entire class . . . the reversion of unclaimed funds to the putative wrongdoer . . . the fact that the class that was denied relief did not have separate counsel from the counsel for the favored class" and that the class notice failed to inform Information-Sharing Class members of the Massachusetts Action. *Mirfasihi,* 356 F.3d at 785. Despite this holding, it approved the Third Settlement and $750,000 in attorneys' fees for the same class counsel whose conflicts of interest fatally infected the First Settlement.

It is impossible to imagine how attorneys-fiduciaries for the Information-Sharing Class could have concluded that the Third Settlement is in the Information-Sharing Class's best interest. *See Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000) (rejecting settlement where absent class members "received nothing"); *Molski v. Gleich,* 318 F.3d 937, 953 (9th Cir. 2003) (rejecting settlement where defendant "was required to make tax deductible donations to third parties") and at 955 (settlement unfair where it "released almost all of

the absent class members' claims with little or no compensation"). In light of these unresolved conflicts and the inadequacy of the recovery, the inescapable conclusion is that the interests of the Information-Sharing Class were sacrificed so that class counsel could get paid.

The attorneys who negotiated both settlements suffered from several substantial conflicts of interest while negotiating the Third Settlement. First, class counsel had no incentive to obtain a Third Settlement that contained the improvements that the Petitioners-Objectors demanded because doing so would only show both that they inadequately represented the Class members during the negotiation of the First and Second Settlement, and that these Objectors are responsible for any improvements in the Second and Third Settlement. So, for example, current class counsel did not press the advantage they had from Fleet Mortgage being judicially estopped from challenging class certification when negotiating the Second and Third Settlement. Second, current class counsel have attempted to create the illusion that they are separately representing the Information-Sharing and Telemarketing Classes when, in reality, they are the same attorneys who represented both Classes for the First Settlement and are now all seeking to be paid out of one common fund set aside for attorneys' fees. Third, current class counsel are conflicted from pressing the Unfair Settlement Claim that arose from the settling parties' obtaining an unconstitutional and unconscionable appeal bond because, as fiduciaries for the Information-Sharing

Class which they "sold down the river," they themselves face liability for such claims.

C. In Approving the Settlement, the Seventh Circuit Deviated from the Majority Rule That It Owed a Fiduciary-Like Duty to Absent Class Members

Although well aware both that the settling "information-sharing" class was receiving nothing ($0) and that numerous Courts of Appeal "have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries," *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 280 (7th Cir. 2002) (citations omitted), the Seventh Circuit itself failed to meet that standard here. Instead of exercising the degree of care required to protect absent class members from releasing their FCRA claims in an inadequate settlement giving them $0, it erroneously concluded that those claims had been waived and/or were beyond the scope of the remand. *See Mirfasihi*, 551 F.3d at 686 (App. 5-6).

The District Court's conclusion that the FCRA claim was not waived is entirely consistent with the established law that, in order to protect the rights and interests of absent class members, a district court must "quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate." *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002). In fact, given the District

Court's independent, fiduciary-like duty to protect absent class members, the FCRA claim could not have been waived without being valued as part of valuing a proposed class action settlement.

The District Court clearly and correctly understood that valuing the FCRA claim was within the scope of the remand, *i.e.*, "to fully consider the potential value of the claims of one of the putative classes (the 'information-sharing class')." App. at 13 (citing *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745 (7th Cir. 2006)) (*"Mirfasihi II"*). Specifically, the District Court cited several passages from *Mirfasihi II* demonstrating that it was required to evaluate Petitioners-Objectors' FCRA claim. First, the District Court noted that it had been criticized for "not canvas[sing] **all potential avenues of recovery** to determine whether the information-sharing class's claims were indeed essentially hopeless (and thus worthless) under the pertinent controlling law." App. at 18 (citing *Mirfasihi II* at 747) (emphasis added). Second, it realized that "a claims analysis, under these circumstances, would require consideration of (1) the probability of the information-sharing class's having grounds for recovery under **any** applicable law." App. at 18 (citing Mirfasihi *II* at 750) (emphasis in original).

The District Court went on to value the FCRA claim but wrongly concluded that "neither the FCRA nor TILA are sound bases on which the information-sharing class may assert claims." App. at 28. This was not "harmless error" because there are somewhere between 1.4 and 1.6 million affected Fleet Mortgage customers and statutory damages

would be no less than $100 but no more than $1,000 per violation, so a successful FCRA claim here is potentially worth somewhere between $140 million (1.4 million customers times $100 each) and $1.6 billion (1.6 million customers times $1,000 each). While it is impossible and unnecessary at this stage to predict with certainty whether the FCRA claim will prevail, it is impossible to conclude as the Seventh Circuit did that, as a matter of law, the FCRA claim has no value.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 30, 2009

IN THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

NO. 07-3402

MAV MIRFASIHI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

FLEET MORTGAGE CORPORATION

APPEAL OF ANGELA PERRY AND MICHAEL E. GREEN

DATE OF JUDGMENT	12/30/2008
TRIAL JUDGE:	HON. JOAN H. LEFKOW
COURT FROM WHICH APPEALED:	U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
ATTORNEYS FOR APPELLANTS:	JOHN P. ZAVEZ TONY KIM
ATTORNEYS FOR APPELLEES:	JON W. BORDERUD CLIFFORD A. CANTOR CHRISTINA M. TCHEN
NATURE OF THE CASE:	CIVIL
DISPOSITION:	AFFIRMED
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BAUER, POSNER, AND WILLIAMS, CIRCUIT JUDGES.

POSNER, CIRCUIT JUDGE:

¶1.This class-action suit is before us for the third time; our previous opinions are reported at 356 F.3d 781 (7th Cir. 2004), and 450 F.3d 745 (7th Cir. 2006). The current appeal like the previous ones presents questions concerning class-action procedure.

¶2.The suit was brought eight years ago on behalf of approximately 1.6 million persons whose home mortgages were owned by Fleet Mortgage Corporation. The complaint charges that without their permission Fleet transmitted information about these persons' finances (plus other personal information, such as phone numbers), obtained from their mortgage files, to telemarketing companies which then, in conjunction with Fleet, used that information and deceptive practices to try to sell them financial and other services that they otherwise would not have been interested in. Fleet's transmission of the information to the telemarketers was alleged to violate, among other laws, the federal Fair Credit Reporting Act and state consumer protection statutes. Two plaintiff classes were proposed-a "pure" "information-sharing" class of 1.4 million customers of Fleet whose financial information Fleet transmitted to the telemarketers but who did not buy anything from them, and a separate "telemarketing" class composed of 190,000 customers of Fleet who made purchases from the telemarketers. The second class is not directly involved in this appeal.

¶3.The parties negotiated a settlement, which the judge approved in 2002 simultaneously with certifying the classes. But he did not explain why he thought certification proper; he merely recited the criteria in Rule 23. The settlement gave nothing to the information-sharing class, while barring its members from bringing individual suits. The treatment of that class was one of the grounds for our reversing, at the behest of two class members who had objected to the settlement and intervened in the litigation, the district court's judgment approving the settlement.

¶4.On remand the parties negotiated a new settlement, which the district court (a different judge) approved. This settlement required Fleet to pay to public interest law firms (or other charitable groups) concerned with consumer privacy the $243,000 that Fleet had earned from its sale of information to the telemarketers, plus any of the funds earmarked for the members of the telemarketing class that ended up being unclaimed, minus, however, considerable expenses. As far as the information-sharing class was concerned, the basis of the district judge's approval of the new settlement, which again gave that class nothing, was that the value of the class members' claim was zero: they had no chance of obtaining damages if the case went to trial and judgment.

¶5.We again reversed at the behest of the objecting class members, ruling that the district judge had not made an adequate effort to value the claims of the information-sharing class. Among other things, she

had considered the consumer protection statutes of only a few states, even though there were members of the information-sharing class in every state.

¶6. On remand she conducted a more complete survey of state law and again concluded that the claims had no value. The objecting class members again appeal, arguing not only that the claims have value (perhaps in excess of a billion dollars!) but also that the objectors should have been awarded a much larger legal fee than the $18,750 that the judge awarded them.

¶7. There is no evidence that any members of the information-sharing class suffered any harm from Fleet's disclosing information about them to telemarketers. Nineteen states plus the District of Columbia, however, permit an award of statutory damages, ranging from $25 in Massachusetts to $10,000 in Kansas but averaging $1,046.25, for violations of their consumer protection statutes. (These figures are based on a table in the supplemental appendix to the appellees' brief in this court, and are not contested by the appellants. We exclude two states, California and Idaho, that allow a $1,000 award of statutory damages in a class action only to the class as a whole.)

¶8. It is arguable that the unauthorized disclosure of financial information violated those statutes. But the statutes do not permit the award of such damages in a class action. The objectors do not challenge the application of that limitation to a class action filed in federal district court. Yet we have held that unless based on state substantive law such a limitation does

not bind a federal court in a class action litigated in that court. ***Thorogood v. Sears, Roebuck & Co.***, 547 F.3d 742, 746 (7th Cir. 2008). Having failed to preserve the issue, the objectors cannot invoke that ruling-and anyway they haven't tried to.

¶9.They do argue that even if the claims of the members of the information-sharing class have no value in a class action, they have value in individual actions. A number of states do as we just noted authorize statutory damages in such actions, and conceivably some of the 1.4 million members of the class (not all of whom live in such states, however) would sue if not precluded by the settlement. That preclusion is a benefit to Fleet, and the objectors argue that Fleet should pay the class for it. But after eight years of litigation, the objectors are unable to identify a single member of the class who would sue on his own dime to collect the modest statutory damages available in an individual suit. Cf. ***Id.*** at 747.

¶10. The objectors point out that state consumer protection laws to one side, the federal ***Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq.***, authorizes the award of statutory damages of not less than $100 or more than $1000 for a willful violation of the Act, without need to prove harm. § 1681n(a)(1)(A); see ***Safeco Ins. Co. v. Burr***, 551 U.S. 47, 127 S.Ct. 2201, 2206, 167 L.Ed.2d 1045 (2007); compare § 1681o(a). But although the Act was mentioned in the complaint, the objectors first sought to apply it to the information-sharing class after our first remand. That was too late. ***United States v. Husband***, 312 F.3d 247, 251 (7th Cir.

2002) (a party " 'cannot use the accident of remand as an opportunity to reopen waived issues' "). On the second appeal, which followed that remand, the parties to the settlement pointed out that the objectors had indeed forfeited their claim under the Act. We did not discuss the Act in our second opinion, but implicitly excluded it from further consideration by stating that "on remand, the district court should consider and analyze the full cross-section of potentially applicable *state* law." 450 F.3d at 751 (emphasis added).

¶11. On remand, the district judge nevertheless discussed (and rejected) the applicability of the Act to the class. She should not have wasted her time on the issue. ***United States v. Husband,*** *supra,* 312 F.3d at 251. The objectors argue that the scope of the remand was ambiguous; it was not; but if the objectors thought it was, or, more plausibly, wanted us to reconsider the scope of the remand, they should have petitioned us for clarification or reconsideration, and they did not. Had they done so, the parties to the settlement would have argued forfeiture and lack of merit, and we would have ruled against the objectors and cut off further litigation on the issue, saving the district judge time and the parties cost. For besides having been forfeited, the claim that Fleet violated the Fair Credit Reporting Act has no possible merit, and in fact is frivolous.

¶12. The Act regulates "consumer report[s]" issued by "consumer reporting agenc[ies]." 15 U.S.C. § 1681a(d)(1). A consumer reporting agency, so far as pertains to this case, is "any person which ... regularly engages in whole or in part in the practice

of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." § 1681a(f). Fleet does not regularly engage in such practices; it is not a consumer reporting agency-it is a bank. ***Frederick v. Marquette National Bank***, 911 F.2d 1, 2 (7th Cir. 1990). "Consumer reporting agencies naturally depend on suppliers of credit to furnish them with credit information. It is the consumer reporting agency that is charged with assuring the accuracy, confidentiality and proper dissemination of this information, however. The [Fair Credit Reporting Act] does not impose obligations upon a creditor who merely passes along information concerning particular debts owed to it." ***DiGianni v. Stern's***, 26 F.3d 346, 349 (2d Cir. 1994).

¶13. Furthermore, "a creditor who merely passes along information concerning particular debts owed to it" is not a purveyor of "consumer reports." For excluded from the definition of consumer report is a "report containing information solely as to transactions or experiences between the consumer and the person making the report." § 1681a(d)(2)(A)(i). What Fleet sold the telemarketers was "information solely as to transactions ... between the consumer [the Fleet mortgagor] and the person making the report [Fleet]." See ***DiGianni v. Stern's***, *supra*, 26 F.3d at 349; ***Smith v. First National Bank***, 837 F.2d 1575, 1578 (11th Cir. 1988) (per curiam).

¶14. So the claims of the information-sharing class are indeed worthless, and if so even $243,000 might

seem excessive compensation-and the amount will grow if not all the settlement money allocated to the telemarketing class is claimed by members of the class-and maybe therefore those claims ought simply to be dismissed. But even if the settlement is merely a nuisance settlement, such settlements are permitted; defendants can be trusted to make such settlements only if it is in their best interest to do so.

¶15. We are disheartened that the litigation by the information-sharing class has been allowed to drag on for eight years, when it had no merit-and that as a matter of law, without need to take evidence. It is an example of the typical pathology of class action litigation, which is riven with conflicts of interest, as we discussed recently in ***Thorogood v. Sears, Roebuck & Co.***, *supra*, 547 F.3d at 744-46. The lawyers for the class could not concede the utter worthlessness of their claim because they wanted an award of attorneys' fees. The lawyers for Fleet were reluctant to argue the utter worthlessness of the claim because they were able to negotiate a settlement that cost their client virtually nothing-provided they did not take such a strong stand that it jeopardized the class lawyers' shot at a generous award of attorneys' fees, and hence the settlement. And the objectors were motivated to exaggerate the value of the claim of the information-sharing class so that they could get a generous award of attorneys' fees. At the very outset of the case, before certifying the class, the district court should have required the parties to present the belatedly presented survey of the consumer protection laws of the 50 states, plus argument concerning the scope of the Fair Credit Reporting Act, to demonstrate the existence of a

colorable claim.

¶16. With what can only be described as *chutzpah,* defined by Leo Rosten as "gall, brazen nerve, effrontery, incredible 'guts,' presumption plus arrogance such as no other word and no other language can do justice to," the objectors ask us to substitute them for the lawyers for the information-sharing class and award them the entire $750,000 in attorneys' fees that the district judge awarded those lawyers; in other words, the objectors are asking us for 40 times the $18,750 attorneys' fee that she awarded them. The request is preposterous.

¶17. It is true that they twice prevailed on appeal and that the sequel to the first appeal was a genuine improvement in the settlement with respect to the telemarketing class. But the sequel to the second appeal was only a very slight improvement in the settlement with respect to the information-sharing class; and it was an improvement less because the $243,000 went to charity, rather than to the other class, than because that figure may grow (though only to a maximum of $804,000, because of the expenses we mentioned). The benefit to the information-sharing class would still be meager no matter how much money went to a public interest law firm or a charity rather than to the members of the class.

¶18. As important to a proper evaluation of the objectors' contribution as the meagerness of the relief that they obtained by extending the litigation by several years is their lack of constructive activity in the district court. They did not propose terms of

settlement or otherwise participate constructively in the litigation other than to appeal. A proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred. See, e.g., ***Farrar v. Hobby***, 506 U.S. 103, 114-15, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); ***Hensley v. Eckerhart***, 461 U.S. 424, 435-37, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); ***Cole v. Wodziak***, 169 F.3d 486, 487-88 (7th Cir. 1999). The success obtained by the objectors was meager, as we have said, and the cost incurred-unknown. The fee applications that they submitted to the district court were barren of the detail required for an assessment of that cost. Moreover, the district judge initially determined their fee to be $37,500, and only later cut it in half as a sanction for their irresponsible litigation tactics (paralleled in this court by the many inaccurate and misleading statements in their briefs and post-argument submission) that exasperated a very patient district judge.

¶19. We are mindful that "it is desirable to have as broad a range of participants in the [class action] fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally," and that "this participation is encouraged by permitting lawyers who contribute materially to the proceeding to obtain a fee." ***Reynolds v. Beneficial National Bank***, 288 F.3d 277, 288 (7th Cir. 2002). But "the principles of restitution that authorize such a result also require ... that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class." ***Id.*** The improvement that the objectors

produced in this case, minus the detriment caused by their courtroom antics, barely justified the modest fee that the judge awarded them.

¶20. This case is *finito.*

¶21. **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT, N.D. ILLINOIS, EASTERN DIVISION

NO. 01 C 722

MAV MIRFASIHI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

v.

FLEET MORTGAGE CORPORATION

ANGELA PERRY AND MICHAEL E. GREEN, INTERVENORS.

DATE OF JUDGMENT:	July 17, 2007
TRIAL JUDGE:	Joan H. Lefkow
COURT FROM WHICH APPEALED:	
ATTORNEYS FOR PLAINTIFF:	Kevin M. Prongay, Jon W. Borderud, Daniel Francis Lynch Taher Kameli Tanya M. Stippich Oren S. Giskan
ATTORNEYS FOR DEFENDANT:	Christina M. Tchen FrancisNeilMcDonald Ryan James Rohlfsen JohnNicolas Albukerk Andrew L. Sandler Gary DiBianco
NATURE OF THE CASE:	Civil
DISPOSITION:	Dismissed
MOTION FOR RE HEARING FILED:	
MANDATE ISSUED:	

LEFKOW, JUDGE:

MEMORANDUM DECISION

¶1.This is the third time that a proposed settlement of this putative class action case is before the district court for approval. The parties are plaintiff Mav Mirfasihi on behalf of himself and all others similarly situated ("plaintiffs") and defendant Fleet Mortgage Corporation ("FMC"). The first time a settlement was before the court was in 2002, when Judge Norgle approved the original settlement. Dkt. No. 88 (Dec. 4, 2002). The Seventh Circuit reversed and remanded the case on January 29, 2004. ***Mirfasihi v. Fleet Mortgage Corp.,*** 356 F.3d 781 (7th Cir. 2004) (*"Mirfasihi I"*). On remand, this court granted the motion of Angela Perry and Michael E. Green ("the intervenors") to intervene. Dkt. No. 122 (Nov. 17, 2004). The parties returned to the bargaining table and came up with the Second Proposed Class Action Settlement ("the Settlement"), which this court approved on August 11, 2005. Mem. Decision, Dkt. No. 170 (Aug. 11, 2005). That decision was appealed as well and the Seventh Circuit again reversed and remanded, although this time the scope of remand has been narrowed to a single issue: to fully consider the potential value of the claims of one of the putative classes (the "information-sharing class"). ***Mirfasihi v. Fleet Mortgage Corp.,*** 450 F.3d 745 (7th Cir. 2006) (*"Mirfasihi II"*). The intervenors have filed another objection to the Settlement. Class Members and Twice-Prevailing Objectors Michael Green and Angela Perry's Second Objection to the Second Proposed Class Action Settlement [Dkt. No. 195] ("Second Objection"). For the reasons that

follow, the Second Proposed Class Action Settlement [# 146] is again approved and the intervenors' Second Objection [# 195] is denied.

BACKGROUND

¶2.The court assumes familiarity with its August 11, 2005 Memorandum Decision and with the proceedings of this case and provides the following background only to give the necessary context for this opinion. This lawsuit was brought on behalf of approximately 1.6 million people whose home mortgages were owned by Fleet Mortgage Corporation ("FMC"). ***Mirfasihi I,*** 356 F.3d 781, 782 (7th Cir. 2004). Plaintiffs allege that, without their permission, FMC transmitted information that it had obtained from the mortgage papers regarding their financial needs to telemarketing companies which then, in conjunction with FMC, used that information and deceptive practices to attempt to sell unwanted financial services to FMC customers. ***Id.*** Plaintiffs allege that FMC's conduct violated the ***Truth in Lending Act, 15 U.S.C. § 1601 et seq.*** ("TILA"), ***the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.*** ("FCRA"), ***the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102***, and state consumer protection laws and common law protections against invasions of privacy.

¶3.Judge Norgle's order certified two classes for purposes of settlement: the "telemarketing class" (approximately 190,000 members) and the "information-sharing class" (approximately 1.4 million members), and the Seventh Circuit has left

these classes undisturbed. Mem. Decision of Aug. 11, 2005, at 8-9; ***Mirfasihi I,*** 356 F.3d at 782. The telemarketing class is composed of the following:[1] (1) all FMC customers outside of Minnesota and California who were billed on their mortgage account statements and paid for a telemarketed membership product or service and did not consent to such charges; and (2) all FMC customers nationwide who were billed on their mortgage account statements and paid for a telemarketed accidental death insurance policy and did not consent to such charges.[2] ***Id.*** The information-sharing class is composed of all FMC customers whose mortgage information was shared with unaffiliated third parties in order to allow those parties to offer products, services, or insurance to FMC customers in the six years preceding the filing of this lawsuit, but who did not buy anything from the telemarketers. ***Id.*** The telemarketing class received individual notice of the original settlement, while the information-sharing class received notice of the original settlement by the publication of a notice in *USA Weekend*. ***Id.***

¶4.The basic terms of the Settlement are as follows. The telemarketing class is eligible for certain monetary relief.[3] For the information-sharing class,

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[1] This current definition is almost but not completely identical to the original definition. The differences are not material to this opinion.

[2] The telemarketing class does not include present and former employees of FMC and FleetBoston Financial Corp.

[3] The proposed Settlement affords those members of the telemarketing class who previously submitted a timely Claim Form in connection with the original settlement the following:

FMC has agreed to disgorge the $243,000 it received from selling the information to unaffiliated third parties and to make a charitable contribution in that amount to the Electronic Privacy Information Center, a public interest research center devoted to privacy education and protection, and/or other charitable institutions devoted to consumer privacy concerns to be determined by mutual agreement of the parties and approved by the court. The

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(1) Any member of the telemarketing class who certified that he or she did not consent to enrollment in a membership product or service offered by telemarketing or accidental death insurance policy offered by telemarketing, and was still being charged for such a product, service or policy, may cancel the product, service, or policy without penalty.

(2) Any member of the telemarketing class who certified that he or she did not consent to enrollment in a membership product or service offered by telemarketing, and was charged for a membership product or service for less than six months, will receive a refund of $10.

(3) Any member of the telemarketing class who certified that he or she did not consent to enrollment in a membership product or service offered by telemarketing and was charged for a membership product or service for more than six months, will receive a refund of 25% of the monthly charges for each month enrolled up to 18 months. Under this formula, the maximum refund for any single product is estimated to be $135.

(4) Any member of the telemarketing class who certified that he or she did not consent to the purchase of an accidental death insurance policy offered by telemarketing, and was charged for accidental death insurance for less than one year, will receive a refund of $12.50

(5) Any member of the telemarketing class who certified that he or she did not consent to the purchase of accidental death insurance offered by tele marketing, and was charged for accidental death insurance for more than one year, will receive a refund of $25.

information-sharing class will not receive a direct payment in any form.

¶5. FMC's maximum payment under the various provisions is $2.4 million, which is exclusive of fees and expenses. After subtracting any amounts paid to satisfy the claims of any class members, including class counsel's fees, any class notice, and costs, whether in the present litigation or otherwise, and subtracting all the amounts FMC paid to settle a related California action, including class counsel's fees and expenses,[4] the balance will be paid to the Electronic Privacy Information Center and/or other charitable institutions devoted to consumer privacy concerns. There will be no reversion of any portion of the $2.4 million to FMC.[5]

¶6. In its 2006 decision, the Seventh Circuit said that "the district court properly analyzed (and disposed of) the objectors' ... complaints not relating to the information-sharing class's claims evaluation and we need not address those issues here (nor need the

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[4] FMC has represented that this amount is $304,696.

[5] Excluded from entitlement to any payment are any FMC customers who, prior to the settlement, received a full refund for any amounts paid for a telemarketed membership product or service or telemarketed accidental death insurance policy, as well as present and former FMC customers with addresses in Minnesota and California who received any refund for membership fees pursuant to the settlement agreements in the Minnesota action and the California action, respectively. In addition, any FMC customer who already received a partial refund for any amounts paid for a telemarketed membership product or service or telemarketed accidental death insurance policy, will have any refund under the settlement agreement reduced by the amount of the past refund.

district court revisit them upon remand." ***Mirfasihi II,*** 450 F.3d 745, 749 n. 1 (7th Cir. 2006). It found, however, that this court "failed to consider with adequate specificity the reasonableness of an entire class receiving a 'big fat zero' in the settlement. Specifically, [this] court did not canvas all potential avenues of recovery to determine whether the information-sharing class's claims were indeed essentially hopeless (and thus worthless) under the pertinent controlling law." ***Id.*** at 747."The analysis should have considered, at a minimum, the pertinent consumer protection statutes (and other potential bases for claims) in the states where the information-sharing class members resided." ***Id.*** at 749."In any event, in basic terms, a claim analysis under these circumstances would require consideration of (1) the probability of the information-sharing class's having grounds for recovery under *any* applicable law; (2) the probability of such favorable law applying to the entire information-sharing class (rather than differing subsets); and (3) the probability of winning on the merits." ***Id.*** at 750."Thus, on remand, [this] court should consider and analyze the full cross-section of potentially applicable state law and arrive at a clearer estimate of the potential value of the information-sharing class's claims to allow proper evaluation of the reasonableness of the proposed settlement." ***Id.*** at 751.

ANALYSIS

¶7.In their "Second Objection to the Second Proposed Class Action Settlement," the intervenors raise several arguments against approving the Settlement, most of which are the same as arguments that they

have raised at least once before.[6] First, they argue that the plaintiffs' claims have value because FMC's conduct constitutes a *per se* violation of all state consumer protection statutes that are based on the ***Federal Trade Commission Act, 15 U.S.C. § 45 et. seq*** ("FTC Act"). Second, the intervenors argue that plaintiffs' federal law claims under TILA and the FCRA have value. They suggest that the plaintiffs might have a claim under TILA based on FMC's nondisclosure of telemarketing charges on its mortgage statements to customers. The intervenors also contend that FMC violated the FCRA, arguing that FMC is a "credit reporting agency" that assembled "credit reports" and that the telemarketing firms used those reports to determine whether FMC's customers were eligible for personal insurance or credit transactions.[7] Third, the intervenors have again raised their "new" claim against FMC for attempting to settle this case "in a manner than violated due process and was substantively unfair." Second Objection, at 9. This is again based primarily on FMC's support for the requirement of an appeal bond of $3.15 million after the original settlement was approved in 2002. Finally, the intervenors complain that class counsel have a conflict of interest and that new individual class notice should be provided to the information-sharing class.

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[6] In fact, some of their arguments were lifted from their first Objection to the Second Proposed Class Action Settlement, filed on June 28, 2005. Dkt. No. 157.Compare Objection, Dkt. No. 157 (June 28, 2005), at 14, with Second Objection, Dkt. No. 195 (Sept. 29, 2006), at 4.

[7] These federal law arguments are the only arguments that have not been raised before.

¶8.In response, FMC and the plaintiffs argue that many of the intervenors' arguments are outside the scope of the Seventh Circuit's remand. Additionally, they emphasize their key points that the information-sharing plaintiffs cannot recover because, *inter alia,* they have not suffered any actual damages and the information that FMC sold was already a matter of public record. FMC and the plaintiffs conclude that the information-sharing plaintiffs' claims appear to be meritless, and therefore the Settlement should be approved again.

¶9.This court took the suggestion of the Seventh Circuit and "request[ed] additional briefing ... to obtain greater information and analyses pertinent to claims evaluation in this case ."***Id.*** at 751.Plaintiffs and FMC have each provided the court with comprehensive 50-state surveys of state consumer protection and privacy law.

A. State consumer protection statutes

¶10. The intervenors argue that the plaintiffs' claims have value because FMC's conduct constitutes a *per se* violation of all state consumer protection statutes that are based on the FTC Act. From that premise, they conclude that the members of the information-sharing class are entitled to millions of dollars in statutory damages. As is ably shown by FMC and the plaintiffs, however, the intervenors have ignored critical elements of the consumer protection laws that defeat their class action claim for statutory damages.

¶11. Most critically, the information-sharing plaintiffs have not suffered any damages as a result of FMC's conduct. Mem. Decision, Dkt. No. 170, at 11.On the contrary, the intervenors concede that the information that FMC disclosed about the plaintiffs was already a matter of public record.[8] ***Id.*** In states that allow for the recovery of statutory damages in class actions (of which there are only seven plus the District of Columbia), plaintiffs must still plead and prove actual injury, ascertainable loss, or damage in order to be entitled to recover statutory damages.

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[8] The intervenors state without explanation that FMC disclosed "*nonpublic* personal and/or financial information."*See, e.g* ., Intervenors' Second Objection to the Second Proposed Class Action Settlement, at 1 (emphasis added). Similarly, they say that the information-sharing class "suffered actual money damages from the sale of its personal information as measured, for example, by disgorgement of the profits Fleet received for selling such information."***Id.*** at 4; *see also* ***Id.*** at 8 n. 3; 13. Profits made by FMC, however, are not a proper measure of damages to the plaintiffs in this context. Despite the fact that FMC and the plaintiffs have strongly emphasized the importance of these facts, both in the briefing that took place in 2005 and in the current set of briefs, and this court focused on the plaintiffs' lack of actual damages in its August 11, 2005 opinion approving the Settlement, ***see*** Memorandum Decision [Dkt. No. 170], at 11-12, 14, the intervenors have still failed to allege any concrete or specific damage or injury to any named information-sharing plaintiff. This persistent omission qualifies as a judicial admission that no actual damages have occurred, which has the effect of removing the fact from contention. ***Clark v. Robert W. Baird Co., Inc.,*** 152 F.Supp.2d 1040, 1045 (N.D.Ill. 2001) (citing ***Keller v. United States,*** 58 F.3d 1194, 1199 n. 8 (7th Cir. 1995); ***American Title Ins. Co. v. Lacelaw Corp.,*** 861 F.2d 224, 227 (9th Cir. 1988)). The intervenors' references to the Seventh Circuit opinions and to FMC's "admissions," see Second Objection, at 4, do not stand for the propositions for which they are cited.

FMC's Brief in Further Support of the Parties' Class Action Settlement After Limited Remand from the Seventh Circuit ("FMC's Brief"), at 5, Ex. A; Plaintiffs' Brief Addressing the Remanded Issue of Valuation of Information-Sharing Class Claims ("Plaintiffs' Brief"), at 7-8, Ex. 1.

¶12. Massachusetts's consumer protection law, Mass. Gen. Laws Ch. 93A, § 9, on which the intervenors rely, falls into this category. It provides, "Any person ... who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two ... may bring an action ... for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper." Mass. Gen. Laws Ch. 93A, § 9(1)."[I]f the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two." ***Id.*** at § 9(3). Although the Massachusetts Supreme Court case ***Leardi v. Brown,*** 394 Mass. 151, 474 N.E.2d 1094 (Mass.1985), suggests that the information-sharing plaintiffs might have a viable claim even without proof of actual damages, later cases have made it clear that Massachusetts's law requires proof of at least some loss or adverse effect, even if not economic. *See* ***Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.,*** 445 Mass. 790, 802, 840

N.E.2d 526, 535 (Mass. 2006) ("Every consumer is, of course, entitled to the full protection of law. If any person invades a consumer's legally protected interests, and if that invasion causes the consumer a loss-whether that loss be economic or noneconomic-the consumer is entitled to redress under our consumer protection statute. A consumer is not, however, entitled to redress under G.L. c. 93A, where no loss has occurred. To permit otherwise is irreconcilable with the express language of G.L. c. 93A, § 9, and our earlier case law."); *see also* ***Chapman v. Katz,*** 448 Mass. 519, 536-37, 862 N.E.2d 735, 749 (Mass. 2007).[9]

¶13. In this case, the intervenors (and the plaintiffs) have had ample opportunity to allege that an injury or loss occurred but have not done so. For example, no information-sharing plaintiff has alleged that he spent any time preventing or undoing any harm caused by FMC's conduct or that he was otherwise injured in any way. Because the information disclosed was already a matter of public record, there was no reason to "recover" it, and FMC's disclosure could not have caused any harm. The plaintiffs have no viable claim in Massachusetts or the states like it.

¶14. The information-sharing plaintiffs' claims are not viable under any other state's consumer protection laws either, for various reasons. Some

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[9] The court takes note of ***Kuhn v. Capital One Fin. Corp.,*** 2006 WL 3007931, 67 Mass.App.Ct. 1111 (Mass. App. Ct. Oct. 23, 2006), an unpublished opinion cited by the intervenors. The court need not decide whether this case can be relied on because in any event it is consistent with the cases cited above.

states do not provide statutory damages at all for violation of their consumer protection laws; some do not allow private class actions for statutory damages; and in some states, the statute of limitations has run for any potential claims that plaintiffs could make. In many states more than one of these limitations apply. *See* FMC's Brief, at 3-6, Ex. A (50 state survey); Plaintiffs' Brief, at 6-12, Ex. 1 (50 state survey). The intervenors do not challenge the accuracy of the parties' surveys and after careful and thorough review, the court finds them to be accurate, comprehensive, and very helpful and commends FMC and the plaintiffs for their work. The court therefore concludes that the information-sharing plaintiffs do not have a viable claim under any state's consumer protection law.

B. State privacy laws and common law protections

¶15. The intervenors do not address the applicability of state privacy laws to the information-sharing class, but FMC persuasively argues that any such claims would be meritless. It is supported by the reasonable idea that "the interests in privacy fade when the information involved already appears in the public record." ***Cox Broad. Corp. v. Cohn,*** 420 U.S. 469, 494, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); ***Connick v. Myers,*** 461 U.S. 138, 143 n. 5, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (citing ***Cox*** as holding that an "action for invasion of privacy cannot be maintained when the subject-matter of the publicity is matter of public record.").

¶16. Actions for invasion of privacy take various forms but none of them fits well with the facts at

issue here. The first, "publication of private facts," generally requires that the plaintiff show that the defendant gave publicity to matters concerning private life, when such publication would be highly offensive to a reasonable person, and where the facts are not of legitimate concern to the public. FMC's Brief, at 8 (citing the Restatement (Second) of Torts § 652D). Because the information that FMC disclosed was already a matter of public record, the plaintiffs cannot maintain a claim that FMC publicized private facts. *See* FMC's Brief, at 7-8, Ex. C; Restatement (Second) of Torts § 652(D) cmt. b ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record ..."). The second form of invasion of privacy, "intrusion upon seclusion," also does not provide the plaintiffs with a viable claim. This generally requires a showing that the defendant intruded on the plaintiffs' seclusion or private affairs in a way that would be highly offensive to a reasonable person. FMC's Brief, at 10 (citing the Restatement (Second) of Torts § 652B). As noted in the comments to the Restatement, however, and as held by many state courts, "there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. "Restatement (Second) of Torts § 652B cmt. c; *see also* FMC's Brief, at 10-11, Ex. C.

¶17. The final form of invasion of privacy, appropriation of name or likeness, requires a showing that the defendant appropriated the

plaintiff's name or likeness without consent for its own benefit. FMC's Brief, at 14 (Citing Restatement (Second) of Torts § 652C). As explained in the comments to the Restatement, "[t]he common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose."Restatement (Second) of Torts § 652C cmt. b. The facts involved here, where FMC sold a list of plaintiffs' names and some financial information about them, do not fit within this paradigm; FMC did not purport to use any of plaintiffs' names or likenesses to endorse its product. There is no indication that any of plaintiffs' names were intrinsically valuable or well known; instead, the value of FMC's list was due to the fact that plaintiffs' names and information were not well known to the buyer. Furthermore, plaintiffs will have difficulty showing that FMC shared their information without their consent, because they have admitted that FMC's Privacy Principles stated that FMC "may share information with [other] companies if they provide a product or service that may benefit [FMC's] customers."FMC's Brief, at 14; Mem. Decision, Dkt. No. 170, at 13.Furthermore, in 21 states, plaintiffs must also establish one or more of the following elements: (1) injury; (2) the names of the class members alone have commercial value; and (3) the names were used to promote or advertise a product or service. FMC's Brief, at 12-13. As has been discussed, plaintiffs here cannot establish any of those elements.

¶18. Because the information disclosed by FMC

was a matter of public record and because plaintiffs have alleged no particular injury caused by the disclosure, plaintiffs have no reasonable prospect of recovery under any state's invasion of privacy laws.[10]

C. Federal claims under TILA and the FCRA

¶19. FMC and plaintiffs argue that consideration of any federal claims is outside of the scope of the Seventh Circuit's remand order and therefore the court should not revisit the merits of the intervenors' arguments regarding claims under TILA or the FCRA. Because these claims are easily disposed of, the court addresses them on the merits.

¶20. First, the intervenors say, "[FMC] argues that allegations based on its charging inappropriate late fees would not state a claim under TILA, but it conveniently ignores the issue of whether it violated TILA by including undisclosed telemarketing charges on its mortgage statements to customers."The late fee issue was dropped by the plaintiffs after discovery showed that it was an isolated customer service issue specific to Mr. Mirfasihi. And there are no allegations that the information-sharing class incurred undisclosed telemarketing charges on their mortgage statements; that would place them into the telemarketing class.

¶21. Second, regarding the FCRA, it is sufficient to say that the information-sharing plaintiffs cannot

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[10] Although states' laws may vary somewhat from the language of the Restatement, none have been found by the parties or the court to vary in any material way that might allow plaintiffs to recover.

recover because they did not suffer any actual damages. ***Ruffin-Thompkins v. Experian Information Solutions, Inc.,*** 422 F.3d 603, 607 (7th Cir. 2005). Therefore, neither the FCRA nor TILA are sound bases on which the information-sharing class may assert claims.

D. Other claims and issues

¶22. The intervenors suggest in one sentence that "[b]ecause [FMC] breached its own promises to the information-sharing class about the privacy of their information, Fleet's conduct gives rise to breach of contract and breach of fiduciary claims that could be certified on a national basis."Elsewhere, however, they have conceded that FMC disclosed in its Privacy Principles that it might share information about its customers with other companies. Mem. Decision, Dkt. No. 170, at 13.It is not clear what the intervenors are suggesting regarding this potential breach of contract action, but it appears to the court that a breach of contract claim would not be viable.

¶23. The intervenors have also once again raised the issues of the unfair settlement claim, a potential conflict of class counsel, and the need for new individual class notice. This court has previously rejected the unfair settlement claim and the allegation that class counsel is conflicted. Mem. Decision, Dkt. No. 170, at 14-15; 18-19; 23.These holdings are outside of the scope of the Seventh Circuit's remand and the intervenors have not raised any new facts that would warrant reconsideration of these issues. Finally, the Seventh Circuit has specifically held that individual class notice is not

required. ***Mirfasihi,*** 356 F.3d at 786.

CONCLUSION AND ORDER

¶24. For all of the foregoing reasons, the court concludes that the information-sharing plaintiffs do not have any realistic prospect of recovery under any applicable law.[11] The litigation value of their claims is minimal. On the other hand, the Settlement disgorges FMC of the profits that it made selling the plaintiffs' information and requires it to pay at least $243,000 to an organization that specializes in the education and protection of privacy rights, which is likely to provide a benefit to the members of the class. *Compare* ***Mace v. Van Ru Credit Corp.,*** 109 F.3d 338, 345 (7th Cir. 1997). Therefore, the Second Proposed Class Action Settlement [# 146] is fair, reasonable, and adequate and it is again approved. The intervenor's Second Objection [# 195] is overruled. The court incorporates by reference all other holdings of its August 11, 2005 decision.

¶25. This case is dismissed with prejudice.

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[11] Because the court has found that the information-sharing class does not have any reasonable likelihood of recovery under any applicable law, there is no need to move on to consider whether any such law would apply to the entire class and what the likelihood would be of plaintiffs winning on the merits.

OPPOSITION BRIEF

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Supreme Court, U.S.
FILED
MAY 4 - 2009
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No. 08-1221

In the
Supreme Court of the United States

ANGELA PERRY AND MICHAEL GREEN,

Petitioners,

-against-

MAV MIRFASIHI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, AND FLEET MORTGAGE CORP.,

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT FLEET MORTGAGE CORPORATION IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioners Angela Perry and Michael Green were Objectors to the settlement and Appellants below.

Respondent Mav Mirfasihi was lead-Plaintiff/Appellee below.

Respondent Fleet Mortgage Corp. was Defendant/Appellee below.

STATEMENT PURSUANT TO RULE 29.6

Respondent Fleet Mortgage Corp. was acquired by Washington Mutual Home Loans, Inc. on June 1, 2001. In connection with the acquisition, FleetBoston Financial Corp., now known as Bank of America Corp., assumed the defense of this action. Bank of America does not have any parent corporations. No publicly held company owns 10% or more of Bank of America's stock.

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INTRODUCTION

This litigation has been going on for eight years, during which Petitioners have taken three appeals challenging the fairness of a class action settlement. They now ask this Court to review an issue which the Seventh Circuit found they had forfeited because they raised it for the first time only after the case was remanded. Judge Posner further correctly characterized the issue as "frivolous," "worthless," and having "no possible merit". (Pet. App. 6-7.)

Although the issue as presented by Petitioners concerns the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), Petitioners' goal is to have the Court overturn a settlement thrice approved by a district court and ultimately affirmed by the Seventh Circuit because, in Petitioners' view, the settlement inadequately compensates certain class members who, they concede, suffered no injury. Petitioners also assert the settlement inadequately compensates their counsel. However, as the Court of Appeals recounted, Petitioners "did not propose terms of settlement or otherwise participate constructively in the litigation other than to appeal," and the district court reduced Petitioners' legal fees as a sanction for "irresponsible litigation tactics" which the Court of Appeals determined were paralleled in that "court by the many inaccurate and misleading statements in their briefs and post-argument submission." (*Id.* at 9-10.)

Had Petitioners properly preserved the FCRA issue, review by this Court still would not be warranted. The issue does not present an important federal question, and the Seventh Circuit's *dicta* addressing it is not in conflict with the decisions of other circuit courts of appeal or of this Court. And far from departing from the accepted and usual course of judicial proceedings, the courts below have, over the course of multiple appeals and remands, thoughtfully and thoroughly considered every aspect of the proposed settlement to ensure its fairness. Respondent Fleet Mortgage Corp. ("FMC" or "Fleet") therefore respectfully requests that the Court deny the Petition and allow the approved settlement to be effected to end this litigation.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 551 F.3d 682. (Pet. App.) The other pertinent decisions of the United States Court of Appeals for the Seventh Circuit are reported at 450 F.3d 745, and 356 F.3d 781. The pertinent decisions of the United States District Court for the Northern District of Illinois are unreported and can be found at 2007 WL 2608778, 2007 WL 2066503, 2005 WL 1950386, 2004 WL 2609184, and 2002 U.S. Dist. LEXIS 27113.

COUNTER-STATEMENT OF THE CASE

FMC and Petitioners agree that "[t]his case has had a tortured procedural history." (Pet. 5.) Beyond that, the Petition is replete with inaccuracies, misrepresentations and distortions of the record. Respondent accordingly sets out the significant procedural history. [1]

I. Origins of the Case

In 2001 and 2002, several class action complaints were filed in federal and state courts alleging that FMC unlawfully transmitted to telemarketing firms personal information from the mortgage files of persons whose mortgages it held. (*See* Pet. App. 2.) *See also Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2005 WL 1950386, at *1 n. 1 (N.D. Ill. Aug. 11, 2005), *rev'd* 450 F.3d 745 (7th Cir. 2006) (*Mirfasihi II*). Among these was a complaint filed by Petitioners Angela Perry and Michael Green ("Petitioners") in Massachusetts state court, which asserted claims under a state consumer protection statute and other state laws,

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[1] A detailed recitation of the facts relating to the original and revised settlement agreements and the proceedings before the Seventh Circuit and the district court is set forth in *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682, 684-85 (7th Cir. 2008) (*Mirfasihi III*), *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 746-47 (7th Cir. 2006) (*Mirfasihi II*); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 782-86 (7th Cir. 2004) (*Mirfasihi I*); and *Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2005 WL 1950386, at *1-*5 (N.D. Ill. Aug. 11, 2005), *rev'd* 450 F.3d 745.

but which did not assert any claim under the Fair Credit Reporting Act. *See Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2007 WL 2608778, at *2 (N.D. Ill. Sept. 6, 2007); *see also id.* at Dkt. No. 157 (filed June 28, 2005); *Lassman v. Fleet Mortgage Corp.*, No. 01-4806, Superior Court for the Commonwealth of Massachusetts (filed Nov. 5, 2001). In 2001, after these cases were filed, FMC was sold to Washington Mutual Home Loans, Inc. and ceased to exist.[2]

Subsequently, four of the class actions were consolidated in the U.S. District Court for the Northern District of Illinois and two classes were certified for purposes of settlement: (1) an "information-sharing" class of approximately 1.4 million FMC customers who did not buy anything from telemarketers to whom FMC allegedly transmitted information; and (2) a "telemarketing" class composed of approximately 190,000 FMC customers who purchased a product from the telemarketers. (*See* Pet. App. 2-3.) *See also Mirfasihi*, 2005 WL 1950386, at *1 n. 1.[3]

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[2] Defense of this matter was assumed at that time by FleetBoston Financial Corp., now known as Bank of America Corp.

[3] Two other cases, *Minnesota v. Fleet Mortgage Corp.*, No. 01-CV-0048 (D. Minn.), and *Koluncich v. Fleet Mortgage Corp.*, No. RCV 052783 (California Sup. Ct. San Bernardino County 2001), were settled separately. *Mirfasihi*, 2005 WL 1950386, at *1 n. 1.

II. Petitioners' First and Second Appeals

In 2002, the district court, over Petitioners' untimely objections, approved an initial settlement agreement. *Mirfasihi*, 2007 WL 26068778, at *2; *Mirfasihi*, 2007 WL 2066503, at *1. Petitioners appealed, and on January 29, 2004, the Seventh Circuit reversed in part and remanded to allow the district court to estimate "the value of the legal claims of the information-sharing class." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) ("*Mirfasihi I*"). Specifically, the Seventh Circuit identified several "warning signs" for the district court to consider on remand, including: (1) "the denial of any relief to an entire class"; (2) "the reversion of unclaimed refunds to the putative wrongdoer"; (3) "the class that was denied relief did not have separate counsel from the counsel for the favored class"; and (4) "the failure of the notice of settlement to inform members of the information-sharing class" that there was a pending matter in state court in which their "rights would be extinguished, unless they opted out of" the settlement. *Id.* at 785. The court, however, reiterated that these were mere "warning signs" and did "not suggest that deletion of the reversion provision, or notice of the Massachusetts suit, or even the award of some relief for the information class, were per se requirements of an acceptable settlement." *Id.*

On remand, a new settlement was proposed that addressed certain of the concerns identified by

the Seventh Circuit, but did not provide any additional compensation to members of the information-sharing class. The district court assessed the value of the information-sharing class's claims at zero, in part, because, as Petitioners conceded, the information allegedly shared by FMC was a matter of public record, and because no member of the class had alleged actual damages. (Pet. App. 3.) *Mirfasihi*, 2005 WL 1950386, at *7-*9. Petitioners did not contend on remand that FMC's alleged conduct violated the information-sharing class's rights under FCRA. *See Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, Dkt. Nos. 113 (filed Sept. 16, 2004), 157 (filed June 28, 2005). Only after the district court approved the revised settlement, *see Mirfasihi*, 2005 WL 1950386, and Petitioners appealed, did they first assert any FCRA claims. At that time, FMC argued that Petitioners had waived their FCRA arguments by failing to assert them before the district court. *See* FMC's Resp. Br. at 18-19, Case No. 05-3669, available at http://www.ca7.uscourts.gov/briefs.htm.

On June 19, 2006, the U.S. Court of Appeals for the Seventh Circuit ordered a limited remand to allow the district court to consider a single issue: the value of the state law claims asserted on behalf of the information-sharing class. *Mirfasihi II*, 450 F.3d at 746, 751. The Seventh Circuit expressly approved all other findings by the district court. *Id.* at 749 n. 1 (stating that "the district court properly analyzed (and disposed of) the objectors' other

complaints not relating to the information-sharing class's claims evaluation and we need not address these issues here (nor need the district court revisit them upon remand)"). Although the court did not expressly discuss FCRA in its opinion, it implicitly excluded the FCRA claims from further consideration by limiting the remand to the narrow issue of state law claims. *Id.* at 751. (*See also* Pet. App. 6.)

III. Petitioners' Third Appeal

On remand, the district court asked the parties to address the potential value associated with the class members' state law claims. (Pet. App. 20.) The plaintiffs and FMC submitted comprehensive, fifty-state surveys of state consumer protection and privacy laws. (*Id.*) Petitioners did not. *Mirfasihi*, 2007 WL 2608778, at *6. "[A]fter careful and thorough review," the district court found that the surveys of state law were "accurate, comprehensive, and very helpful." (Pet. App. 24.) The district court noted also that Petitioners had not challenged the accuracy of the surveys. (*Id.*)[4] Based on this analysis, the district court held that Petitioners "do not have a viable

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[4] The district court added that plaintiffs' and FMC's "research, and not the intervenors' [Petitioners'] unsupported statements, assisted the court greatly in evaluating the plaintiffs' potential claims under each and every state's law, which was a lengthy and in the end fruitless undertaking." 2007 WL 2608778, at *6.

claim under any state's consumer protection law" or under any state privacy law. (*Id.* 24-27.)

Although the appeals court had made clear there was no need to revisit any other issue, and while acknowledging the other parties' argument that the FCRA and Truth-in-Lending Act ("TILA") claims were waived and were outside the scope of the limited remand, the district court nevertheless considered Petitioners' FCRA and TILA arguments because they were "easily disposed of." (*Id.* 27.) The court found that "neither the FCRA nor TILA are sound bases on which the information sharing class may assert claims." (*Id.* 28.) "[R]egarding the FCRA," the district court specifically added, "it is sufficient to say that the information-sharing plaintiffs cannot recover because they did not suffer any actual damages." (*Id.* 27-28.) On July 17, 2007, the district court entered an order approving the settlement and finding that Petitioners had no reasonable prospect of recovery under any applicable law. (*Id.* 12-29.)

In a subsequent order, the district court awarded Petitioners $18,750 in attorneys' fees. *Mirfasihi*, 2007 WL 2608778. In setting the fee award, the court noted that Petitioners had "burdened the court at least as much as they [had] helped it." *Id.* at *6. "[W]hile the intervenors [Petitioners] correctly identified some troublesome elements of the settlement," the court observed, "they did not meaningfully assist the court in analyzing those issues." *Id.* at *7. The fee amount

reflected the court's decision to award Petitioners' counsel fees totaling 5% of the fees awarded to class counsel, with the "modification" that the amount be reduced by one-half (or 2.5% of the fee awarded to class counsel) "to account for the burden that the objectors have placed on all parties involved." *Id.* Petitioners appealed both orders to the Seventh Circuit.

In affirming the district court's approval of the revised settlement, the Seventh Circuit held that Petitioners' FCRA claims were not properly before the court. (Pet. App. 5-6.) The Seventh Circuit found that "although [FCRA] was mentioned in the complaint, [Petitioners] first sought to apply it to the information-sharing class after our first remand. That was too late." (Pet. App. 5 (citing *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002) (a party "'cannot use the accident of remand as an opportunity to reopen waived issues'").) The court added that although it "did not discuss [FCRA] in [*Mirfasihi II*], [it] implicitly excluded [FCRA] from further consideration by stating that 'on remand, the district court should consider and analyze the full cross-section of potentially applicable *state* law.'" (*Id.* 6 (emphasis in original).)

Thus, the appeals court stated, the district court "should not have wasted [its] time on the issue." (*Id.*) "[B]esides having been forfeited," Judge Posner stated, "the claim that Fleet violated the Fair Credit Reporting Act has no possible merit,

and in fact is frivolous." (*Id.*) In *dicta*, the Seventh Circuit added that FMC was not a consumer reporting agency under FCRA, 15 U.S.C. § 1681a(f), because FMC did not "'regularly engage[] in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.'" (*Id.* 6-7 (quoting § 1681a(f)).) In so stating, the Seventh Circuit recognized that FMC "'merely passe[d] along information concerning particular debts owed to it'" and is therefore not a consumer reporting agency. (*Id.* 7 (quoting *DiGianni v. Stern's*, 26 F.3d 346, 349 (2d Cir. 1994)).) The court added that FMC sold "'information solely as to transactions ... between the consumer [the Fleet mortgagor] and the person making the report [Fleet].'" (*Id.* (citing *DiGianni*, 26 F.3d at 349; *Smith v. First Nat'l Bank*, 837 F.2d 1575, 1578 (11th Cir. 1988) (per curiam)).)

The Seventh Circuit stated also that there was "no evidence that any members of the information-sharing class suffered any harm from Fleet's disclosing information about them to telemarketers." (*Id.* 4.) The court concluded that "the claims of the information-sharing class are indeed worthless[.]" (*Id.* 7.)[5]

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[5] Thus, Petitioners failed to substantiate any claim of any value before any court, notwithstanding that they have astronomically increased the asserted value of those claims at each step of the litigation, including before this Court. *Compare Mirfasihi*, 2007 WL 2608778, at *3 (recognizing that *(cont'd)*

The Seventh Circuit decried Petitioners' "chutzpah" in requesting that the entirety of the attorneys' fees awarded to class counsel ($750,000) be transferred to Petitioners' counsel, referring to the request as "preposterous." (*Id.* 9.) After recognizing that Petitioners' "twice prevailed on appeal," the court stated:

> As important to a proper evaluation of the objectors' contribution as the meagerness of the relief that they obtained by extending the litigation by several years is their lack of constructive activity in the district court. They did not propose terms of settlement or otherwise participate constructively in the litigation other than to appeal.

(*Id.* 9-10.) The court concluded:

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in *Mirfasihi I* (2004), the Seventh Circuit discussed Petitioners' argument that "the information-sharing class could expect . . . total damages of . . . $35 million"), *with Mirfasihi*, 2005 WL 1950386, at *6 (recognizing that as of 2005, Petitioners asserted that they "have additional claims against FMC and FleetBoston . . . that would entitle members of the information-sharing class to at least a doubling but no more than a trebling of their damages, potentially amounting to damages in the amount of $105 million"); (Pet. App. 4) (recognizing that in 2008, Petitioners alleged that their "claims have value (perhaps in excess of a billion dollars!)"); *and* (Pet. 19, 28) (asserting before this Court that the FCRA claim could be worth $140 million to $1.6 billion).

> The success obtained by the objectors was meager, as we have said, and the cost incurred-unknown. The fee applications that they submitted to the district court were barren of the detail required for an assessment of that cost. Moreover, the district judge initially determined their fee to be $37,500, and only later cut it in half as a sanction for their irresponsible litigation tactics (paralleled in this court by the many inaccurate and misleading statements in their briefs and post-argument submission) that exasperated a very patient district judge.
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> * * *
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> The improvement that the objectors produced in this case, minus the detriment caused by their courtroom antics, barely justified the modest fee that the judge awarded them.

(*Id.* 10-11.)

REASONS FOR DENYING THE WRIT

Petitioners raise an issue that has been waived, and in any event fail to present any compelling reason for this Court to grant a writ of certiorari because (1) Petitioners have failed to

identify any split among the circuit courts of appeal regarding the application of FCRA; and (2) the root of Petitioners' claim involves the circuit court's assessment of whether the district court abused its discretion in determining that a settlement is fair. Petitioners' rehashing of properly rejected legal theories and waived arguments therefore offers no basis to grant certiorari, and the Petition should be denied.

I. Petitioners Forfeited Any FCRA Claim

The crux of Petitioners' request for certiorari is the refusal of the courts below to place any value on their belatedly-raised FCRA arguments. Yet, as the Seventh Circuit correctly recognized, Petitioners did not seek to apply FCRA to their claims until it was "too late": after the Seventh Circuit's initial remand in 2004. (Pet. App. 5 (citing *Husband*, 312 F.3d at 251).)

As the Seventh Circuit held, Petitioners' FCRA arguments were not properly before it. Accordingly, Petitioners' question cannot be the subject of certiorari review in this Court. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n. 4, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (recognizing that an argument not raised below is waived); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 895, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (refusing to consider an issue that had been raised for the first time in the reply brief filed in the court of appeals). *See also Husband*, 312 F.3d at 250 ("any issue that could have been but was not

raised on appeal is waived and thus not remanded"); *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (same); *Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.").

II. Petitioners Offer No Compelling Reason To Grant Certiorari

Even if Petitioners had not waived their FCRA claim, the issue does not warrant review by this Court.

A. Petitioners Do Not Raise an Important Federal Question or Identify a Split Among the Circuit Courts Regarding the Question Presented

The Seventh Circuit's *dicta* concerning FCRA conflicts with neither the decision of any other court of appeals nor with any Supreme Court decision. In fact, as Respondents have maintained (and as the Seventh Circuit found, *see* Pet. App. 6-7), regardless of how broad the overarching purpose of FCRA, FCRA by its terms does not apply to FMC.

First, notwithstanding their assertion that "every court to consider the issue has disagreed with the Seventh Circuit" (Pet. 7), Petitioners do not identify a single case which held that a

mortgage company such as FMC is a consumer reporting agency under FCRA. Instead, they cite inapposite cases, none of which concerns mortgage companies, and most of which hold that the entity at issue, like FMC, was not a consumer reporting agency for purposes of the Act. (*See* Pet. 8-9.) At the same time, cases are legion holding that banks and other financial institutions are not consumer reporting agencies within the meaning of FCRA. *See, e.g.*, *Frederick v. Marquette Nat'l Bank*, 911 F.2d 1, 2 (7th Cir. 1990) (finding that Marquette National Bank is not a consumer reporting agency); *Friend v. Ancillia Systems Inc.*, 68 F. Supp. 2d 969, 974 (N.D. Ill. 1999) (holding that a financial institution that does no more than give information to a third party is not acting as a consumer reporting agency); *Batchelor v. First Nat'l Bank*, No. 92 C 5073, 1993 WL 22859, *3 (N.D. Ill. Jan. 20, 1993) ("Since defendant's alleged wrongdoing is as a provider of information about a consumer transaction in which it was involved, defendant cannot be liable under the Fair Credit Reporting Act."). *See also DiGianni*, 26 F.3d at 349 ("The FCRA does not impose obligations upon a creditor who merely passes along information concerning particular debts owed to it."); *Oldroyd v. Assocs. Consumer Disc. Co./PA*, 863 F. Supp. 237, 241 (E.D. Pa. 1994) (holding that FCRA is not applicable to a mortgage company that is not regularly engaged in assembling credit information for the purpose of furnishing consumer reports to third parties).

FCRA, moreover, contains an exemption from the definition of "consumer reports" for information relayed that concerns only an entity's transactions and experiences with its customers. *See* 15 U.S.C. § 1681a(d)(2)(A)(i) (stating that "the term 'consumer report' does not include ... [a] report containing information solely as to transactions or experiences between the consumer and the person making the report"). Although Petitioners contend that "every court to consider the issue has disagreed with the Seventh Circuit on the scope of the §1681a(d)(2)(A)(i) exemption" (*see* Pet. 10-12), they identify nothing in the record to establish that the information allegedly transmitted by FMC to telemarketers included anything other than "information solely as to transactions or experiences between the consumer and the person making the report." 15 U.S.C. § 1681a(d)(2)(A)(i).

FMC was alleged to have provided telemarketers with information from customers' mortgage files (such as loan amounts and telephone numbers) (*see Lassman v. Fleet Mortgage Corp.*, No. 01-4806, Superior Court for the Commonwealth of Massachusetts (filed Nov. 5, 2001), at ¶10), information which, as Petitioners conceded below, was publicly available. *Mirfasihi*, 2005 WL 1950386, at *7. As the Seventh Circuit correctly recognized, this alleged conduct falls within the exemption. (Pet. App. 7 (stating that "[w]hat Fleet sold the telemarketers was 'information solely as to transactions ... between the consumer [the Fleet mortgagor] and the person making the report

[Fleet]'".) Petitioner's belated claim that FMC "violated FCRA more than one million times" (Pet. 13) thus "has no possible merit, and in fact is frivolous," as the Seventh Circuit properly concluded. (Pet. App. 6.) *See also DiGianni*, 26 F.3d at 349 (recognizing that FCRA excludes "from the statutory definition of consumer report" any "reports 'containing information solely as to transactions or experiences between the consumer and the person making the report'"); *Smith*, 837 F.2d at 1578 (stating that "where the Bank has reported information based solely on its own experience with one of its customers, the Bank is not acting as a 'consumer reporting agency,' within the meaning of the Fair Credit Reporting Act"); *Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1096 (5th Cir. 1992) ("The 'transactions and experiences' provision exempts from coverage any report based on the reporter's first-hand experience of the subject."); *Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985) (information "based solely on [defendant's] own credit records of store transaction[s] ... cannot constitute a 'consumer report' under the FCRA"); *Friend*, 68 F. Supp. 2d at 974 (finding that "[a] report containing information solely as to transactions or experiences between the consumer and the person making the report is specifically excluded from the term 'consumer report'").

B. The Seventh Circuit's Decision Did Not Stray from the Accepted and Usual Course of Judicial Proceedings

Most issues arising under Federal Rule 23 are committed in the first instance to the discretion of the district court. *Califano v. Yamasaki*, 442 U.S. 682, 703, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). A district court's approval of a class action settlement is no exception. *See, e.g.*, *Evans v. Jeff D.*, 475 U.S. 717, 741-43, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986) (applying the abuse of discretion standard of review in upholding a district court's fee waiver in a class action settlement); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (recognizing that the Seventh Circuit's review of a district court's approval of a class action settlement is limited to whether the court abused its discretion).

Here, the Seventh Circuit thoroughly assessed the district court's exercise of that discretion three times, and on two occasions sent the proposed settlement back to the district court for more work. In the order which Petitioners would have this Court review, the Seventh Circuit correctly determined that the district court had thoroughly reviewed the one outstanding issue identified in *Mirfasihi II* – an estimation of the value of Petitioners' state law claims. The Petition does not challenge the determination by the district court, affirmed by the court of appeals, that their state law claims had no value.

Petitioners, moreover, do not assert that either the district court or the Seventh Circuit improperly stated the controlling law as to any issue. [6] To the contrary, the Seventh Circuit properly stated the controlling law, carefully analyzed the district court's judgment (with the benefit of having twice considered the settlement), and thoughtfully affirmed the district court's decision. The Seventh Circuit's decision can in no way be said to depart from the standard course of judicial proceedings, let alone stray so far from the standard as to warrant this Court's attention.

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[6] In this regard, Petitioners' belated attempt to assert that the Seventh Circuit failed to follow *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), is unavailing. First, never in any of the numerous proceedings below did Petitioners raise *Amchem* or contend that certification of the class for purposes of settlement was improper. Second, Petitioners do not contend before this Court that the Seventh Circuit erred in approving the district court's certification of the class for settlement purposes, which was the issue addressed in *Amchem*.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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